United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
BARRY KRINSKY, Esq.
(20 minutes)

B/S

DOCKET NO. 74-2272

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,
Appellee,

-against-

ANTHONY LaVECCHIA, et al.,
Defendants-Appellants

HERBERT KURSHENOFF
Appellant.

- X

BRIEF FOR APPELLANT HERBERT KURSCHENOFF

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2. Did the evidence respecting appellant establish multiple conspiracies requiring acquittal?

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PRELIMINARY STATEMENT

Indictment 73 CR 305 charged appellant and others with conspiracy to "possess, conceal, buy, receive, transfer and deliver substantial quantities of counterfeit Ten Dollar ($10.00) Federal Reserve Notes", with intent to defraud. (18 U.S.C. sec. 371, sec 472 and 473). Of those charged in the indictment,* three defendants, Anthony LaVecchia, Edward Bogan, Nicholas Andriotis, were tried with appellant and charged with substantive

*Anthony LaVecchia, Edward Bogan, John McMillan, Albert Evangelista, Benjamin Pankiewicz, Phillip Martino, Nicholas Andriotis and appellant.

violations of the counterfeit laws. Appellant was named only in the conspiracy count.

After trial in the Eastern District of New York, before District Court Judge Orrin Judd, with a jury, appellant was found guilty of the conspiracy. The other three defendants were convicted of the substantive counts and the conspiracy. On September 13, 1974, appellant was sentenced to six months in prison, to be followed by two and one-half years probation.

Appellant was continued on bail pending appeal, and Barry Krinsky, Esq., who had been assigned pursuant to the Criminal Justice Act at trial, was continued as counsel to prosecute this appeal.

STATEMENT OF FACTS

The Government contended that commencing in June, 1971, and terminating in February, 1973, appellant, the co-defendants at trial, and others named in the indictment conspired to violate the counterfeit laws. The Government's case was founded primarily upon the testimony of two accomplices, Dominic Russo and John McMillan. Additional evidence was offered by undercover officers and Secret Service Agents who conducted surveillance, searches, and seized evidence admitted at trial.

The Alleged Conspiracy

John "Shorty" McMillan, an indicted co-conspirator and previously convicted felon, testified that in June, 1971, Albert Evangelista had asked him whether he could obtain counterfeit money (537-8). McMillan called Anthony LaVecchia who gave McMillan approximately three hundred thousand dollars in counterfeit notes (542).* The following day McMillan gave Evangelista, whose nickname was "Alibi", a package of the bills. Later he sold some of the balance of the bogus money to Dominic Russo, the witness' cousins and Albert Setford nicknamed "Spike" and Evangelista (547).

In June, 1972, Russo and he agreed to sell more counterfeit money, which he obtained from LaVecchia. The bills were divided into $5,000 packages at Russo's house (560-563). He delivered one of the packages to Phillip Martino (563). He and Russo went to 46th St. where Russo said he delivered a package to one "Herbie" (564). A few days later he received a second package of $25,000 from LaVecchia; Russo and he again divided the money as previously and went to 46th Street where Russo said he delivered one package to the same person. Subsequently McMillan received $100,000 in counterfeit

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*Numbers in parenthesis refer to pages of the trial transcript.

from LaVecchia which was contained in a shopping bag (572).

On January 12, 1973, he was arrested for violation of the counterfeit laws (576). On February 13, 1973, while acting as informant for Government, he asked LaVecchia for $25,000 and on February 15 LaVecchia and he arranged a meeting and delivery of the counterfeit money (578).

On the same day, LaVecchia gave McMillan a key to a locker at Penn Station. Agent Ronald Kramer transported him to Penn Station where McMillan removed a package containing counterfeit money from a locker. The package was given to Agent Kramer (600).

DOMINIC RUSSO had known Albert Setford and Albert Evangelista all his life and McMillan fifteen years. In June, 1971, he saw McMillan in a bar and was asked if he wanted counterfeit money (399). He was shown samples, and received two deliveries of $10,000 in counterfeit each. Then McMillan "disappeared" for a year (399-400).

He next saw McMillan in June, 1972, when he was asked whether he was interested in counterfeit money (402). He was shown samples, which he, in turn, showed to appellant and Phillip Martino. Appellant allegedly said he was interested. When McMillan gave $25,000 to Russo, he drove

with McMillan to appellant's business where he gave him a five thousand dollar package of counterfeit money in exchange for genuine currency (403). A few days later, McMillan called Russo, indicated he had $25,000 more and gave it to him. Again he took a $5,000 package to appellant and again they discussed the price and exchanged the counterfeit for genuine currency (406).

Subsequently, Phillip Martino, to whom Russo had given part of the two $25,000 packages, told him of a deal for $150,000 in counterfeit currency (407). Russo called McMillan, informed him that Martino wanted the $150,000 and then McMillan contacted Martino. Two or three weeks later, McMillan brought a shopping bag containing $100,000 and delivered it to Russo's house (408). The contents were divided and a $10,000 package was given to Martino (409). Two or three weeks later, Martino introduced Russo to Agent JOSEPH COPPOLA. This introduction led to Russo's sale to Coppola of counterfeit currency and subsequent arrest in November, 1972 (410, 423).

Agent JOSEPH R. COPPOLA had been introduced to Albert Setford and Albert Evangelista at a restaurant in Manhattan in July, 1971, by an informant (269). At the time they had a conversation regarding bogus money and the number of points, or purchase price for counterfeit

currency. Coppola indicated he was interested in purchasing counterfeit, was shown samples, and the following day bought $,000 in counterfeit notes from Setford (272).

In 1972, Coppola was introduced to Dominic Russo by an informant, Phillip Martino. Although Russo was reluctant to undertake a transaction face to face, on September 6, 1972, Russo sold $10,000 of bad notes to the Agent through Phillip Martino. Martino was given the bag containing the counterfeit and in turn gave it to Coppola. The genuine currency was dropped into the car in which Russo was seated (272-275).

On August 24, 1972, Agent RONALD KRAMER purchased counterfeit money from Phillip Martino (290, 801). Two weeks later, he negotiated another purchase from him (294). On September 6, 1972, when the sale was to be consummated, they met at Wetson's on Astoria Blvd. (294). When Martino indicated the money was in a bag in a garbage can, Kramer gave a pre-arranged signal and Martino was arrested (295). Martino agreed to cooperate and became an informant (801).

In January, 1973, McMillan was arrested and agreed to cooperate with the Government (803). On February 15, 1973 Kramer monitored a conversation between McMillan, who had been fitted with a kelset, and another party,

and saw McMillan with LaVecchia outside Beacon Discount Store, University Avenue and 18th Street, Manhattan (807). An hour after this initial observation, Kramer saw McMillan in a car with LaVecchia and followed them to 29th Street and Lexington Avenue, where McMillan exited the automobile (824). Kramer then drove McMillan to Penn Station where McMillan opened a locker and removed a package containing counterfeit money (825).

Later that day, Agent JOHN SIMON, Jr., participated, with other agents, in executing a search warrant for Beacon Printing Co. located at 270 Lafayette Avenue, Manhattan (113-121). At that location he found negatives, mats, and a substantial quantity of counterfeit money. Agent DARIO MARQUEZ, who had spoke with Edward Bogan at Beacon Printing on February 6 arrested him on February 15. Agent DENNIS SATTERLEE, who had conducted surveillance at Beacon Discount Store, 125 E. 18th Street, Manhattan, where he saw Bogan and LaVecchia together, placed LaVecchia under arrest inside the store (224, 229). He removed keys from LaVecchia which were ultimately given to Agent DALTON McINTOSH who searched a blue automobile which LaVecchia had been observed driving (255). Agent JEFFREY KIERSTEAD had seen LaVecchia walk to the car, open the trunk, close it and walk to Beacon Discount store (246). Inside the trunk of the car

currency was found, the serial numbers of some of the bills matched those previously recorded by Agents, before being given to McMillan.

The Testimony Inculpating Appellant

The only evidence purportedly establishing appellant's participation in the alleged conspiracy was provided by Dominic Russo. Russo had been charged in two counts of instant indictment (424). He acknowledged that he understood that he was confronted with a possible twenty-five year sentence (424). He pleaded guilty to a charge of conspiracy, understanding that his pending indictment would be dismissed and his "cooperation" would be made known to the sentencing judge (390, 394, 435).

During the course of interviews with various representatives of the Government, he admitted other counterfeit transactions besides those which are the subject of this indictment (440). And he believed that he would not be prosecuted for those offenses, as he had been so informed by Agent Coppola (441).

He testified that he had committed perjury at his first appearance before the Grand Jury (392, 446, 482). He was told that the Agents knew that he had lied to the Grand Jury and that the agreement between him and the

Government would be revoked (449). However non-prosecution for perjury became part of the agreement and he later testified before the Grand Jury on March 23, 1973 (448, 482). At this second appearance, he implicated appellant.

Russo stated that he was employed as a school bus driver, and consequently drove children of various ages. However, he had had a heart attack and when applying for a chauffeur's license had intentionally misrepresented that he had no heart problem (456-460). Although he read at a third grade level, and was unable to read Grand Jury minutes, he had obtained a real estate license by guessing at the questions on the qualifying examination (456-457). Moreover, after his January 11, 1973 meeting with The Assistant United States Attorney, and the Agents, he went to one of the alleged co-conspirators, Phillip Martino, and "probably" solicited him to fabricate a story to substantiate his statements to the governmental representatives (946).

Finally, he admitted that he would lie to help himself (949).

Regarding appellant, Russo testified as follows: (pp 402-407)

BY MR. DE PETRIS:

Q Directing your attention to June 1972 --

A Yes.

Q -- did there come a time when you saw John McMillen?

A Yes.

Q Would you relate to the Court and the jury the circumstances under which you saw John McMillen then?

A He called me up one day and he told me, he says, "Are you still interested in counterfeit money?" And I says "Yes." And he says, "I'll bring you down some samples." He brought me down some samples.

Q Please continue.

A I took the samples, I went to see Herbie and this fellow named Philly.

Q Who is Philly?

A Philly Martino.

Q You testified you went to see Herbie?

A Yes.

Q Where did you go?

A I went to his place of business in New York City, 47th Street.

Q What type of business is it?

A Toupe business. Mr. Esquire is the name of it, the name is Mr. Esquire in the City on 47th Street. I showed him a few samples and he said he's interested in it.

Q I can't understand you.

A I showed him a few samples. He says he was interested in it.

THE COURT: Speak a little louder.

A Then John got in touch with me again and brought me down a $25,000 package. When he brought down the $25,000 package, I called up Herbie, I told him I had some, we got in John McMillen's car and he drove me into the City, parked in front of Herbie's place and I went upstairs and had a discussion with Herbie about money.

Q Where was Mr. McMillen at this time?

A Sitting in the car.

Q Outside of Mr. Esquire?

A Outside of Mr. Esquire, sitting in the car outside of Mr. Esquire.

Q When you went in to see Herbie, what did you say and what did he say?

A We discussed price. I wanted 25 points. We argued back and forth. He says no,

it's not worth 25 points and we finally got to a decision of 19 points.

After we got the decision of 19 points, he paid me the money, I went downstairs, John was sitting in the car and I gave John the money.

Q Did you give him all the money?

A I gave him all the money and he said we will take $50 apiece, this way he can pay the other guy the balance of the money.

*****

Q How much did you deliver to Herbie?

A I delivered $5,000 to Herbie. From there I went to see Philly Martino and he took about $15,000 of it, but the rest of the $25,000 was bad. So John took that back.

*****

Shorty called me up again and says "Do you want any more?"

MR. LA ROSSA: Who called?

THE WITNESS: Shorty, John McMillen. Sorry. John McMillen.

He called me up again. When he come down I had to pay him the balance of the $25,000 because he gave it to me on consignment. He took the money and he left and he come back, I think it was a day or two later, and he brought me another $25,000.

Q Where did he bring it?

A To my house, same -- 1158 49th Avenue. And then the second time -- I believe I called up Herbie and told him I had some more and I was coming over with some. We got in my car --

Q Who is "we"?

A Me and John McMillen got in my car and we went to the City. John waited downstairs again in front of Before and -- in front of Mr. Esquire, waited in my car. I went upstairs. I had the same discussion with Herbie about money and price. We finally decided about 19, again.

Q 19 what?

A 19 points.

Q What are points?

A 19 dollars on every hundred. He paid me the money. I went back downstairs again, I gave the money to John again. Again

he gave me $50 out of it, about $50, I think it was, and he took the rest to pay off the fellow that he got the money from.

None of the defendants testified.

At the close of the testimony appellant's Rule 29 motion was denied.

All defendants were found guilty of conspiracy and the three co-defendants were found guilty of the substantive offenses with which they were charged.

ARGUMENT

POINT I

EVIDENCE OF TWO SEPARATE ISOLATED PURCHASES WAS INSUFFICIENT TO ESTABLISH APPELLANT JOINED ANY CONSPIRACY.

Assuming arguendo the credibility of Dominic Russo, the evidence of two isolated purchases of counterfeit money failed to show that appellant "promoted /the/ venture himself," "made it his own" and had "a stake in the outcome." United States v. Falcone, 109 F. 2d 579, 581, affirmed 311 U.S. 205 (1940).

This Court has held, under the "Single Act Doctrine" that an act or series of acts of an alleged conspirator does not establish complicity in a conspiracy. United States v. Koch, 113 F. 2d 982, 2d Cir. (1940); United States v. Reina, 242 F. 2d 302, 2d Cir. (1957); United States v. Peoni, 100 F. 2d 401, 2d Cir. (1938); United States v. Aviles, 274 F. 2d 279, 2d Cir. (1960). These cases teach, however, that there is less a hard and fast numerical standard then a perusal of evidence to determine whether "a jury could conclude that they /defendants/ were aware that the scope of the conspiracy was larger then their participation as respective individuals." United States v. De Noia, 451 F. 2d 979, 2d Cir. (1971). The fact that two transfers were allegedly made does not remove appellant from the

purview of the basic premise established in the "single act" cases. In United States v. Borelli, 336 F. 2d 376, 387, 2d Cir. (1964), the purchases by Borelli "were so frequent and so large as to suggest strongly that he was a continuing customer.../yet/ such evidence standing alone might not have sufficed to warrant submitting /the question of/ Borelli's participation in the...activity to the jury...."* The Court held that knowledge of the broader conspiracy could not be inferred from numerous deliveries in United States v. Stromberg, 268 F. 2d 256, 257, 2d Cir. (1959).

There was no testimony establishing appellant knew that his vendor was other than an independent, albeit illicit, entrepreneur. Russo testified to two isolated purchases, solicited in both instances by himself. Despite being acquaintances for between ten and fifteen years, at no time did Russo testify that his partnership

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*With respect to cases involving drug rings, distributing large amounts of drugs, this Circuit has, understandably, held that major buyers are presumed to know the scope and nature of the operation they associate with. Common knowledge, and experience indicate the purchase of large quantities of drugs could not have commenced with their immediate seller. A hierarchy of importers, cutters, and distributors are inferable. United States v. Bynum, 485 F. 2d 490, 495, 2d Cir. (1973); United States v. Arroyo, 494 F. 2d 1316, 2d Cir. (1974).

with others was ever revealed to appellant.*

The Court's observation in United States v. Koch, supra, is appropriate here.

> Here, for aught that appears, the appellant had no knowledge whatever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro's possession of it was unlawful and that was true also of the sale to and purchase by him. But there was nothing in the evidence to warrant a finding that he knew that Mauro was not, or had not previously been, acting alone in getting possession of the drug or how he may have obtained it.
>
> 113 F. 2d at p. 983

Not only was McMillan, who had allegedly driven Russo to the appellant's business, not present during the exchange, but there is no evidence whatsoever that his presence in the car was made known to appellant. On the contrary, the evidence establishes that appellant could reasonably infer he was dealing only with Russo. Russo's statement that their only conversation was to negotiate the rate of exchange permitted the inference that Russo was an "independent peddler," answerable to no partner or criminal hierarchy. Cf. United States v. Santore, 290 F. 2d 51, 2d Cir. (1960) 56-7. Absent proof of knowledge of the scope of the conspiracy or circumstances permitting such

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*Knowledge of Russo's illegitimate activities cannot be inferred from the mere fact of their association. Not only is appellant a businessman without prior arrests, but the evidence reveals no prior illicit dealings.

inference, appellant's association with the conspirators in a common scheme or plan has not been proven.

The evidence failed to rise to the quantum stated to be insufficient in United States v. Purin, 486 F. 2d 1363, 2d Cir. (1973), where this Court declared.

> We have no quarrel with the general proposition advanced by appellant that a mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish a conspiracy.
>
> United States v. Falcone, supra
> United States v. Peoni, 100 F. 2d 401, 2d Cir. (1938) at p. 1369

In United States v. Peoni, 100 F. 2d 401, 2d Cir. (1938), Peoni had sold counterfeit money to Regno who, in turn, sold to Dorsey. All three were charged with conspiracy. In reversing the conviction of Peoni for conspiracy with Dorsey, Judge Learned Hand stated:

> Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody might get them, but a conspiracy imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them.

Similarly here, appellant was not alleged to have solicited Russo for further bogus moneys. In fact, in both transactions Russo's initiative led to appellant's

purchase, negating any concert or plan to obtain the counterfeit. Possessing counterfeit, Russo merely offered it to appellant. Indeed, while the duration of the conspiracy was two and a half years, involving at least ten persons, only Russo testifies to any personal contact respecting appellant. And despite reception of many declarations of alleged co-conspirators, not once other than through Russo, does anyone of those named mention appellant at all. Significantly, Russo's response to the Assistant United States Attorney's question asking for the conversation between appellant and Russo is that they only discussed price. Had appellant inquired of the source of the money, or solicited a continuing relationship, such testimony should have been elicited by this broad question. (See Statement of Facts, p. 10-11.) It is clear there was no concerted purpose, limited or broad. See United States v. Bostic, 480 F. 2d 965, 6th Cir. (1973).

Significantly this Court has ruled insufficient evidence more probative of knowledge of the venture and its purpose than in this case. In United States v. De Noia, 451 F. 2d 979, 2d Cir. (1971), De Noia, while armed with a firearm had delivered a kilogram of heroin to a third party, Pavia, who was to sell to an agent.

Although dealing in narcotics is more susceptible, by its very nature, of an inference of knowledge of a broader conspiracy than with the respective individuals, the conviction of a purchaser who took delivery through a runner was reversed in United States v. Civiles, 274 F. 2d 279, 2d Cir. (1960). The single sale of heroin by Valachi in United States v. Reina, supra, at the direction of a conspirator, Schillitani, failed to establish he knew "it was in execution of the larger venture" (at p. 306). And in United States v. Koch, 113 F. 2d 982, 2d Cir. (1940) the purchase of a substantial amount of cocaine, and subsequent payment therefor from the proceeds of the sale of a part thereof, did not establish the purchaser's associates with a conspiracy:

> The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro [seller to Koch] and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him at that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators.

As in Koch, and established by the Government's own witness, once appellant had paid the agreed purchase price, the short-lived relationship of buyer-seller ceased. There was no mutual reliance for any further sales or purchases.

Consequently, the evidence of two isolated purchases of counterfeit money does not establish knowledge of a conspiracy, association therewith and the intent, through one's actions to make it succeed.

POINT II

APPELLANT'S CONVICTION MUST BE REVERSED INASMUCHAS MULTIPLE CONSPIRACIES WERE ESTABLISHED AS A MATTER OF LAW.

Assuming the two isolated purchases by appellant established participation in a conspiracy, the evidence must establish the conspiracy joined was the conspiracy charged:

> If in Judge Learned Hand's well known phrase, in order for a man to be held for joining others in a conspiracy, he must in some sense promote their venture himself, make it his own /citing/, it becomes essential to determine just what he is promoting and making 'his own.'
>
> United States v. Borelli, 336 F. 2d 376, 385, 2d Cir. (1964)

The evidence adduced at trial of two isolated purchases of counterfeit, from Russo, establishes, at most, that Russo and appellant conspired for two purchases but did not associate with the broader on-going counterfeit transactions. Consequently, as to appellant, multiple conspiracies were proven and he should have been acquitted. United States v. Russano, 257 F. 2d 712, United States v. Borelli, 336 F. 2d 376, 2d Cir. (1964).

The focus for determining whether more than one conspiracy exists is the very agreement which constitutes

an element of the conspiracy. This Court has observed:

> "The basic difficulty /in determining if single, or multiple, conspiracies exist/ arises in applying the seventeenth century notion of conspiracy, where the gravamen of the offense was the making of an agreement to commit a readily identifiable crime or series of crimes, such as murder or robbery ...to what in substance is the conduct of an illegal business over a period of years. There has been a tendency ... 'to deal with the crime of conspiracy as though it were a group /of men/ rather than an act' of agreement .... Although it is usual and often necessary in conspiracy cases for the agreement to be proven by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant."
>
> The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a /long/ period, it necessarily does so as to every defendant who has conspired with them at any time, for any purpose, is thus a considerable oversimplification." United States v. Borelli, 336 F. 2d 376, 384, 2d Cir. (1964) (emphasis in original).

Clearly, the only agreements established are extremely limited two separate agreements to exchange counterfeit for genuine currency, unconnected to any on-going scheme or plan.

> But a sale or a purchase socially constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which

accompanies or supplements the transaction. United States v. Borelli, supra, at p. 384.

Indeed, the fact that negotiations were conducted on each of two separate occasions so close in time leads to the conclusion that a continuing association including unidentified but existent parties was not inferable by appellant. Had an outstanding agreement obtained, negotiations anew would have been unnecessary.

In no event however, does the evidence establish that appellant know that parties beyond Russo were supplying or participating with Russo in this illegal transaction. Without such knowledge, his two agreements with Russo, limited in time and scope, cannot be expanded to include a broader agreement. United States v. Borelli, supra, p. 385. Kotteakos v. United States, 328 U.S. 750 (1946). United States v. Varelli, 407 F. 2d 735, 7th Cir. (1969).

That the variance between the conspiracy charged and that proved respecting appellant resulted in prejudice is beyond peradventure. In his charge the Court charged

> If you find that all the counterfeit bills were printed from plates made from the same negatives that were found in 270 Lafayette Street on the night that Mr. Bogin (sic) and Mr. LaVecchia were arrested, you can find that it was a single conspiracy.

The Court only allowed that separate conspiracies could be found in 1971, 1972 and 1973, failing to either focus the attention of the jury on the agreement or to provide any standards for discerning multiple from a single conspiracy. Consequently if the separate conspiracy between LaVecchia, Bogan, Russo and McMillan was established, that evidence could be, and from aught that appears, was used to convict appellant. United States v. Russano, 257 F. 2d 715, 2d Cir. (1958).

Consequently, the Court permitted admission against appellant of evidence as to a separate and distinct conspiracy, the prejudice of which was exacerbated by the Court rejection of defense counsel's proper request under the circumstances of this case, that proof of multiple conspiracies respecting appellant required acquittal.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR IN THE ALTERNATIVE A NEW TRIAL ORDERED.

Respectfully submitted,

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